Supreme Court, U.S.
FILED
MAY 3 1995
OFFICE OF THE CLERK

NO. 94-1727

In the Supreme Court of the United States

OCTOBER TERM, 1994

JEREMY CALHOUN,
Petitioner

VERSUS

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, TWT MOULDING, INC. AND WALL MOULDING, INC.
Defendants-Appellees

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Elizabeth Erny Foote, LSBA No. 5677
Percy, Smith & Foote
720 Murray Street
Alexandria, LA 71309-1632
Tele: (318) 445-4480

Haynes L. Harkey, Jr.
Hayes, Harkey, Smith & Casico
2811 Kilpatrick Blvd.
Monroe, LA 71201
Tele: (318) 387-2422

Attorneys for Defendants-Appellees

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED FOR REVIEW

1. In a suit for personal injuries, where the plaintiff Jeremy Calhoun admits he was working in a business owned and operated by his grandparents and where the general liability policy issued to the grandparents excluded coverage for claims by employees, was the granting of the motion for summary judgment by St. Paul Fire & Marine Insurance Company correct?

2. Where plaintiff did not file suit against defendants, TWT Moulding Company and Wall Moulding, Inc., within the one year prescriptive period and there are no other potential solidary obligors remaining in the lawsuit, was the claim against these defendants prescribed?

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES..... ii

STATEMENT OF THE CASE..... 1

SUMMARY OF THE ARGUMENT..... 10

ARGUMENT..... 14

CONCLUSION..... 48

CERTIFICATE OF SERVICE..... 50

TABLE OF AUTHORITIES

Cases Page

Arnold v. McConnel,.....19, 24, 25
424 So.2d 402 (La.App. 2nd Cir. 1982)

Beard v. Wilson Wholesale Distributors, Inc.,..... 22
215 So.2d 664 (La.App. 1st Cir. 1968)

Bellard v. Delta Polymers, Inc.,..... 18
413 So.2d 269 (La.App. 3rd Cir. 1982)

Caldwell v. Caldwell,.....23, 25
55 So.2d 258 (La.App. 2nd Cir. 1950)

Chance v. American Honda Motor Company, Inc., 635 So.2d 177 (La. 1994) 38,39,43,44,45

Everything on Wheels v. Subaru South, 616 So.2d 1234 (La. 1993) 40

Fidelity & Guar. Ins. v. City of Kenner, 894 F.2d 782 (5th Cir. 1990) 28

Jones v. Thomas, 557 So.2d 1015 (La.App. 4th Cir. 1990) 27

Louisiana Health Service and Indem. Co. v. McNamara 561 So.2d 712 (La. 1990) 46, 47

LeBlanc v. City of Lafayette, 558 So.2d 259 (La.App. 3rd Cir. 1990) 37

Lott v. Haley, 370 So.2d 521 (La. 1979) 37

Lyman v. Town of Sunset, 567 So.2d 1171 (La.App. 3rd Cir. 1990) 46

Picone v. Lyons, 601 So.2d 1375 (La. 1992) 42

Provident Life & Accident Ins v. Turner, 582 So.2d 250 (La.app. 1st Cir. 1991) 42

St. Paul Fire & Marine Ins. Co. v. Richard, 208 So.2d 35 (La.App. 3rd Cir. 1967) 19, 21

Smith v. Xerox Corporation, 718 F.Supp. 494 (E.D. La. 1989) 35

Spain v. Traveler's Ins. Co., 332 So.2d 827 (La. 1976) 29

Spott v. Otis Elevator Company,.....36, 42
601 So.2d 1355 (La. 1992)

Trahan v. Liberty Mutual,..... 40
314 So.2d 350 (La. 1975)

White v. West Carroll Hospital, Inc., ...45, 46
613 So.2d 150 (La. 1992)

Younger v. Marshall Industries, Inc.,.....35
618 So.2d 866 (La. 1993)

Statutes

La. Civ. Code art. 1799..... 35

La. Civ. Code art. 3468..... 34

La. Civ. Code art. 3492.....34, 36

La. Civ. Code art. 3503..... 35

La. R.S. 23:1044.....18

STATEMENT OF THE CASE

Plaintiff's application for Writs seeks to have this Court reverse the 5th Circuit Court of Appeals' affirmation of two separate judgments which dismiss two different defendants - St. Paul Fire & Marine Insurance Company ("St. Paul") and TWT Moulding Company ("TWT") and Wall Moulding, Inc. ("Wall"). These defendants are represented by separate counsel who in the spirit of judicial and economic efficiency join together in submitting this opposition brief.

A. COURSE OF THE PROCEEDINGS AND THE DISPOSITION OF THE COURTS BELOW.

This suit arises out of injuries to Jeremy Calhoun which occurred on December 20, 1990. Jeremy, then sixteen years old, was injured while operating a double miter saw in an art and frame gallery owned by his grandparents, Jerry and Helen Haynes. Suit was filed on July 22, 1991 by Debra Haynes, Jeremy's mother, individually and on behalf of the minor.

Originally named as defendants in this Complaint were St. Paul Fire & Marine Insurance Company, as the general liability carrier for the frame shop, and Dumas Brothers Machine, Inc., as the alleged manufacturer.

TWT and its successor in business, Wall, were impleaded as third party defendants on April 22, 1992. Plaintiff then amended her Complaint on May 5, 1992 to "substitute" TWT and Wall as defendants in the place of Dumas Brothers. Service on these defendants was made on May 29, 1992. In the meantime, on May 18, 1992, having reached the age of majority, Jeremy Calhoun substituted himself as plaintiff. Unsure of the procedural capacity in which they were placed by the voluntary "substitution" of defendants by the plaintiff, Dumas Brothers Machine, Inc. filed a motion for summary judgment on May 5, 1992. This motion was granted, and this defendant was dismissed without prejudice on March 3, 1993. No appeal was taken by plaintiff as to this dismissal.

By motion dated June 24, 1993, St. Paul filed a motion for summary judgment on the grounds that

because the plaintiff was an employee, no coverage was afforded to him under the comprehensive general liability policy which had been issued to Jerry and Helen Haynes d/b/a Haynes Gallery of Monroe. In support of the motion for summary judgment, St. Paul filed the following exhibits:

(1) The deposition of Jeremy Calhoun, pages 13 through 46;

(2) The deposition of Helen Haynes (grandmother), pages 16 through 35;

(3) The deposition of Jessie Calhoun (brother to Jeremy), pages 11 through 20; and

(4) A certified copy of the liability insurance policy issued by St. Paul to Jerry Haynes and Helen Haynes, d/b/a Haynes Gallery of Monroe.

The only countervailing affidavit originally filed by the plaintiff in opposition to the motion for summary judgment was an "Affidavit of Jeremy Calhoun" dated July 28, 1993. Importantly, in the affidavit it is not denied that Jeremy was an employee of the frame shop. Indeed, Jeremy admits in the affidavit that he worked at the frame shop and was paid $3.00 an hour when he worked. The affidavit also states that Jeremy

did not receive any worker's compensation benefits as a result of the accident.

On August 28, 1993, Judge Donald E. Walter issued a memorandum ruling and order granting St. Paul's motion for summary judgment. The judgment was entered on August 30, 1993.

By motion dated September 7, 1993, the plaintiff moved for reconsideration of the summary judgment in favor of St. Paul on the basis that the plaintiff had submitted a reply memorandum on August 25, 1993 which was not received by the court until August 27, 1993. Plaintiff alleged that the court rendered its decision prior to its receipt of the reply memorandum and requested that the court reconsider its decision in light of that reply memorandum. No further evidence was submitted by the plaintiff.

In a memorandum ruling and order dated September 24, 1993, the court denied the motion to reconsider. In doing so, Judge Walter noted that not only was he unsure of the procedural propriety of plaintiff's "reply memorandum", but that he had considered all submissions by both plaintiff and

defendants and was convinced that his original ruling was correct.

In October, 1993, the plaintiff filed a "Second Motion to Reconsider." At that time, the plaintiff submitted an affidavit executed by Durwood Kuhn. Mr. Kuhn stated that he was the accountant for Jerry and Helen Haynes and Haynes Gallery and prepared their tax returns from 1967 through 1990. He stated that Jeremy Calhoun did not receive a W2 or a 1099 in the year of 1990. On October 25, 1993, Judge Walter in a memorandum ruling and order denied the second motion noting:

> As set out in the original order of this court, there is no question as to the fact that Jeremy worked at the Gallery, was given Gallery-related duties to perform, and was paid regularly based solely on the amount of hours he spent at the Gallery, less any advances. He was an employee of the Gallery.

A judgment dismissing St. Paul's claim was signed December 17, 1993 and entered December 20, 1993. The plaintiff appealed via a Notice of Appeal filed January 10, 1994.

In the meantime, the court had issued a scheduling order fixing the deadline to file dispositive motions as October 1, 1993. Because of the drawn-out nature of the opposition to the motion for summary judgment filed by St. Paul, TWT and Wall filed a motion to extend this deadline. The court granted this motion extending the deadline for dispositive motions to October 15, 1993. By this date, as noted above, the court had already issued two memorandum rulings and orders dismissing St. Paul's claim or, more correctly stated, dismissing the claim and denying the motion to reconsider that dismissal. It is admitted that the judgment actually dismissing St. Paul's claim was not signed until December of 1993.

However, in order to comply with the scheduling order, TWT and Wall filed a motion to dismiss on October 14, 1993 on the grounds that the plaintiff's claim was prescribed against these remaining defendants on the face of the record alone. Importantly, the plaintiff opposed this motion to dismiss by memorandum alone. No evidence was submitted

by plaintiff in opposition to the motion to dismiss based upon prescription.

In his brief to this Court, plaintiff quotes the alleged content of the machine's label as well as alleged facts as to the machine's manufacturer and the alleged relationship between Dumas Brothers and TWT and Wall. No such evidence was submitted by plaintiff in the trial court.

The Magistrate Judge (Magistrate Judge John F. Simon) issued a recommendation on November 15, 1993. Contrary to statements made in the plaintiff's brief, the Magistrate Judge agreed with TWT and Wall that once St. Paul and Dumas Brothers had been dismissed, the claims against TWT and Wall were prescribed. However, the Magistrate Judge noted that the judgment dismissing Dumas Brothers had not been certified in accordance with Rule 54(b) of the Federal Rules of Civil Procedure. In fact, Judge Walter had declined to so certify Dumas Brothers' judgment of dismissal upon what, in hindsight, was the ill-considered motion of these defendants. Secondly, Magistrate Judge Simon noted that there had been no

judgment of record dismissing the plaintiff's claim against St. Paul. In summary, it was the position of the Magistrate Judge that because neither of the judgments dismissing the other potential solidary obligors had been certified in accordance with Rule 54(b) of the Federal Rules of Civil Procedure, then the motion to dismiss based upon prescription by TWT and Wall was procedurally premature, although substantively correct.

As stated above, the judgment dismissing St. Paul subsequently was filed of record. In the meantime, written objections to the proposed recommendation on the motion to dismiss were filed by these defendants.

On January 5, 1994, Judge Donald E. Walter entered a minute entry of the court certifying the judgment dismissing Dumas Brothers in accordance with Rule 54(b). On January 11, 1994, TWT and Wall filed a motion for 54(b) certification of the St. Paul judgment.

On January 13, 1994, the court in its own order granted the motion to dismiss filed by TWT and Wall.

On the same day, the court returned the order attached to defendants' motion for entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b) as to the St. Paul judgment indicating that same was moot. Plaintiff timely appealed that motion.

In summary, there were two judgments of dismissal before the Fifth Circuit on two different grounds from which the plaintiff sought relief. The Fifth Circuit Court of Appeals in an unpublished opinion affirmed the trial court's decision as to both judgments. Plaintiff seeks review by this Court of that decision.

B. STATEMENT OF THE FACTS

As all parties concede, Jeremy Calhoun was injured while operating a double miter saw used solely to manufacture picture frames while working in the art gallery and frame shop owned by his grandparents and known as Haynes Gallery of Monroe. Furthermore, it is undisputed that St. Paul Fire & Marine had issued a comprehensive general liability policy to that gallery insuring the owners

against claims by third parties within the limits of the policy.

SUMMARY OF THE ARGUMENT

The plaintiff, Jeremy Calhoun, was injured while he was working in a frame shop and art gallery owned and operated by his grandparents. Because Jeremy Calhoun was rendering services in his grandparents' business, he is presumed to be an employee of that business under the Louisiana Worker's Compensation Act. Jeremy Calhoun was paid wages for the work he performed at the gallery at the rate of $3.00 per hour. He was paid these wages whether he lived with his grandparents or whether he lived elsewhere. Jeremy Calhoun's work was under the direction of his grandfather, grandmother and father. As Jeremy, himself, expressed it, his job was not a "free ride". The wages Jeremy Calhoun received were directly tied to the amount of hours he worked at the gallery. Thus, there are no issues of material fact that Jeremy Calhoun was an employee of the business owned and operated by his grandparents.

The defendant, St. Paul, issued a comprehensive general liability policy to the Haynes business enterprise. This policy contained exclusions for claims made by employees as well as for any obligations under worker's compensation or similar laws. The injuries suffered by Jeremy Calhoun in his capacity as an employee of his grandparents' business is specifically excluded from the liability coverage provided by St. Paul's insurance policy. These exclusions contained within the St. Paul policy are applicable in this case whether or not worker's compensation benefits are available to Jeremy Calhoun. Jeremy's argument that he was illegally employed in violation of the Child Labor law and, therefore, covered by the CGL policy is without merit. Not only does the argument come too late, it also misses the point. The issue before the Court is not whether he had a claim against his grandparents because they employed him in violation of the Child Labor Law. Rather, the issue is whether he falls within the exclusion of the CGL policy. His decision to sue in

tort did not change or eliminate the exclusions in the policy for injuries "to any employee."

The District Court's decision that Jeremy was an employee of the gallery at the time of his accident and, therefore, excluded from the coverage afforded by the St. Paul CGL policy was correct. The decision was affirmed summarily on appeal.

Jeremy Calhoun was injured on December 20, 1990. At the time of his accident, Louisiana law provided that Jeremy Calhoun's representative had one year from this date to file suit in order to recover for his injury. Suit was instituted within this period against Dumas Brothers and St. Paul. After this prescriptive period had run, however, TWT and Wall were "substituted" as defendants in the place of Dumas Brothers. Because TWT and Wall were sued after the prescriptive period had run, the plaintiff bears the burden of proving that prescription was somehow interrupted in order to maintain his action against these defendants. No evidence was introduced by the plaintiff in opposition to the motion to dismiss based on prescription.

While Dumas Brothers and St. Paul could be considered solidary obligors with TWT and Wall in order to interrupt prescription, Dumas Brothers and St. Paul have been dismissed and can no longer be held solidarily liable with TWT and Wall. Therefore, there is no longer any basis upon which prescription was interrupted as to TWT and Wall, and the action against these defendants has prescribed.

The plaintiff asserts that a 1992 amendment to the applicable prescription statute suspended the prescriptive period against Jeremy Calhoun in this suit. However, this 1992 amendment cannot be retroactively applied for it would revive an already prescribed cause of action. Retroactive application of this amendment would disturb TWT and Wall's vested right to raise the issue of prescription.

Secondly, the plaintiff refers in his brief to certain mitigating facts which he wants this court to consider in deciding the prescription issue. The plaintiff did not seek to introduce any such evidence in the trial court. Therefore, despite plaintiff's attempts to raise these controverted facts on appeal, these facts

are not before this court. The Fifth Circuit summarily affirmed the trial court's dismissal of TWT and Wall on the grounds of prescription.

ARGUMENT

I. THE DEFENDANTS OPPOSE THE APPLICATION FOR WRIT OF CERTIORARI BY THE PLAINTIFF, JEREMY CALHOUN, BECAUSE THIS MATTER IS NOT APPROPRIATE FOR REVIEW UNDER THE CONSIDERATIONS GOVERNING REVIEW BY THE UNITED STATES SUPREME COURT.

The plaintiff, Jeremy Calhoun, has petitioned for a writ of certiorari to this Court seeking the review of a decision rendered by the U.S. Fifth Circuit Court of Appeals on December 12, 1994. In this opinion, the Fifth Circuit affirmed two judgments: a judgment granting summary judgment to St. Paul and a judgment dismissing TWT and Wall from the suit.

Rule 10 of the Rules of the Supreme Court state the considerations governing the U.S. Supreme Court's review of writs of certiorari. This Rule lists three criteria used in the decision on whether to grant writs, as follows:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United State court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court.

The case at bar is a suit based upon diversity jurisdiction, and therefore involves a determination of state law. As considerations (b) and (c) concern only those cases involving federal questions, these reasons do not provide support for Jeremy Calhoun's petition for writ of certiorari. The only consideration

which could possibly be applicable to the case at bar is those reasons listed in (a). This consideration, however, is also inapplicable, because there is no conflict between any United States Courts of Appeals in this matter. Nor has the United States Fifth Circuit Court of Appeals decided a federal question in conflict with a state court of last resort. This matter involved only an interpretation of Louisiana law. Thus, the considerations utilized by this Court in reviews on writ of certiorari do not dictate supervisory review in this matter.

In fact, the United States Court of Appeals for the Fifth Circuit expressly determined that the opinion it rendered in this case should not be published in accordance with a local rule, Local Rule 47.5. That rule provides:

> The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession.

This determination by the Fifth Circuit that this appeal was decided on the basis of well-settled principles

further demonstrates that this matter is not appropriate for an exercise of the U.S. Supreme Court's power of supervision. Accordingly, the plaintiff's petition for a writ of certiorari should be denied.

II. THE POLICY ISSUED BY ST. PAUL FIRE & MARINE INSURANCE COMPANY TO JERRY AND HELEN HAYNES D/B/A HAYNES GALLERY OF MONROE EXCLUDED COVERAGE FOR THE INJURIES TO JEREMY CALHOUN, AND THEREFORE SUMMARY JUDGMENT DISMISSING ST. PAUL WAS PROPERLY GRANTED.

It is undisputed that the plaintiff, Jeremy Calhoun, was injured while he was working in a frame gallery owned and operated by his grandparents. In this capacity, Jeremy Calhoun is presumed to be an employee of his grandparents' business. St. Paul Fire & Marine Insurance (hereinafter referred to as "St. Paul") issued a comprehensive general liability policy to the Haynes' business enterprise. This policy contained exclusions for claims made by employees as well as for any obligations under worker's compensation or similar laws. Because Jeremy Calhoun was an employee of his grandparents'

business when he was injured and St. Paul's insurance policy excludes these types of claims, summary judgment dismissing St. Paul was proper.

A. The plaintiff, Jeremy Calhoun, was an employee of Jerry and Helen Haynes when he suffered an injury to his left hand.

A person rendering services for another in any trade, business or occupation covered by the Worker's Compensation Act is presumed to be an employee under that Act. Louisiana Revised Statutes 23:1044. Jurisprudence under this statute places the burden of proof upon the person who contends that they are not an employee. Bellard v. Delta Polymers, Inc., 413 So.2d 269, 270 (La.App. 3rd Cir. 1982). Accordingly, Jeremy Calhoun is presumed under the Louisiana Worker's Compensation Act to be an employee of his grandparents' business. The very fact that he was rendering services in the business raises the presumption that Jeremy was an employee of his grandparents' business. The jurisprudence in Louisiana outlines four primary evidentiary factors in the determination of an employer-employee

relationship. These are: (1) selection and engagement; (2) payment of wages; (3) power of dismissal; and (4) power of control. St. Paul Fire & Marine Ins. Co. v. Richard, 208 So.2d 35, 36 (La.App. 3rd Cir. 1967), writ denied, 210 So.2d 54 (1968).

In Arnold v. McConnel, 424 So.2d 402 (La.App. 2nd Cir. 1982), the court summarized how an employer-employee relationship arises under the worker's compensation act as follows:

> A person may become an employee within the meaning of our Worker's Compensation Act if he is performing a service for another with the latter's consent and subject to his control or direction. No formal contract between the two is necessary and there need be no specific agreement as to how much is to be done or how long the arrangement shall continue. It is not required that the amount or terms of payment be settled, so long as the circumstances fairly indicate that the services were not intended as a gratuity and both parties understood that payment was to be made therefor.
>
> 424 So.2d at 404 (citations omitted).

All of the factors for an employment relationship outlined above are met in the case at bar.

Jeremy was paid wages for the work he performed at the rate of $3.00 per hour. (Deposition of Jeremy Calhoun, p. 21). The number of hours Jeremy worked was recorded on a time card. As he became more responsible Jeremy was able to make more money by working more hours. (Depo. p. 26). If Jeremy did not work, he did not get paid. (Depo. p. 23). Thus, the amount of wages Jeremy received was determined solely by the number of hours he worked. Jeremy was paid these wages whether he lived with his grandparents or whether he was living elsewhere. (Depo. p. 27). If Jeremy's grandmother purchased clothes for him, he paid for these clothes either out of the money he earned at the shop or through a deduction from his wages. (Depo. p. 27). His work was under the direction of his grandfather, grandmother and father. As Jeremy, himself, expressed it, his job was not a "free ride." (Depo. p. 26).

The above facts, to which there was no contradictory evidence offered by the plaintiff, clearly indicate that Jeremy Calhoun was an employee of the

gallery under both Louisiana statutory law and jurisprudence. Therefore, there is no issue of material fact that Jeremy Calhoun was an employee of the business owned and operated by his grandparents.

The plaintiff argues that the mere fact that Jeremy's services were rendered for his grandparents in a business owned and operated by them somehow prevents him from being an employee within the meaning of the Worker's Compensation Act. Louisiana jurisprudence, however, has found an employee relationship in familial settings under facts less clear than those in the case at bar.

An employment relationship was found between a father and son in St. Paul Fire & Marine Ins. Co. v. Richard, 208 So.2d 35 (La.App. 3rd Cir. 1967). In Richard, the plaintiff was injured while operating a tractor on land planted by his son. The son conducted a farming operation in which he leased about 238 acres from others and used this land to plant rice. Sixty-five of those acres was leased from the plaintiff. The employment agreement between the father and son was that they would exchange labor at the rate of

$6.00 per day. However, no sums of money had ever actually exchanged hands between the parties for several years. The third circuit held that a contract of employment existed between the father and son. The court considered the father's services to be an exchange of labor and not a gratuity from the father to his son. Additionally, the court found it important that the father was working on his son's separate farming operation over which the son had exclusive control.

A fifteen-year-old was also found to be an employee of his uncle's company in Beard v. Wilson Wholesale Distributors, Inc., 215 So.2d 664 (La.App. 1st Cir. 1968). Here, the fifteen-year-old went to his uncle's business seeking temporary employment during the Christmas holidays. Prior to this time, the uncle had employed the fifteen-year-old on a part-time basis doing odd jobs whenever needed. On the morning of the accident, the fifteen-year-old spoke to the assistant manager and inquired about employment. The fifteen-year-old was told that his services were not needed that day. In any event, the fifteen-year-old remained on the premises. Shortly

thereafter, a thunderstorm occurred causing water to leak through holes in the roof of a new addition to the business establishment. The assistant manager sought help from his employees in covering the roof to prevent leakage. The assistant manager also sent the fifteen-year-old to the warehouse with the other employees. The employees were instructed to get on the roof and cover the holes with visqueen. During this procedure, the fifteen-year-old fell from the roof and was injured. On appeal, the first circuit had to determine whether the fifteen-year-old was an employee of the company when he was injured. Stating that the Worker's Compensation Act should be liberally construed, the court held that the fifteen-year-old was an employee of his uncle's business at the time of the accident.

The plaintiff contends that Jeremy Calhoun is not an employee of the business, because the money Jeremy received was merely an allowance and not actual wages. In support of this proposition, the plaintiff cites Caldwell v. Caldwell, 55 So.2d 258 (La.App. 2nd Cir. 1950). In Caldwell, the second

circuit found that the plaintiff was not an employee of his father's concrete products manufacturing plant because the weekly wage the son received was a fixed weekly allowance. One of the reasons for the court's decision was that there was no evidence of payment to other employees in the payroll records for the company at the same time that wages were paid to the son. The court specifically stated, however, that such a relationship can exist between a father and son, as follows:

> We have not stated, nor do we here hold, that a contract of hiring between a father and his minor son cannot exist under circumstances that would bring the employment under the provisions of the Workmen's Compensation Act.
>
> 55 So. 2d at 264.

The plaintiff also cites Arnold v. McConnel, 424 So.2d 402 (La.App. 2nd Cir. 1982). Here, the court found that a minor was not an employee of his stepfather, because the minor was not paid anything in addition to his regular allowance for his assistance to his stepfather in picking up hay. No employment

relationship was present, because neither party expected payment for the work performed by the son.

Jeremy Calhoun's situation is clearly different from that in Arnold and Caldwell. Unlike the plaintiffs in Caldwell and Arnold, Jeremy Calhoun's wages were directly tied to the amount of hours he worked at the gallery. This fact is undisputed by the plaintiff. Furthermore, Jeremy Calhoun did not receive money unless he did some work for his grandparents. In Arnold, the stepson received his regular allowance whether or not he assisted in picking up the hay.

The plaintiff also argues that he is not an employee of his grandparents' business, because he was not paid for the work he performed during the week before the accident and the day of the accident. However, defendants submit that the actual payment of wages is irrelevant. Instead, the question is whether the parties understood or expected that payment would be made. It is certainly reasonable to conclude that Jeremy Calhoun did not receive any wages for the preceding week and the day of his accident because his grandparents and he, himself,

were preoccupied with his medical condition at this time.

B. The insurance policy issued by St. Paul to the Haynes Gallery excludes coverage for any injury suffered by Jeremy Calhoun.

The insurance policy issued by St. Paul to Jerry Haynes and Helen Haynes in their business provides coverage which includes commercial general liability protection. Among the exclusions in the policy are exclusions regarding employer's liability. First, this policy excludes:

> bodily injury to any employee of the protected person for which the protected person may be held liable as an employer or any other capacity . . .

Additionally, the policy excludes liability for worker's compensation obligations as follows:

> WORKER'S COMPENSATION. We won't cover any obligation that the protected person has under worker's compensation, disability benefits or unemployment compensation law, or any similar law.

Jeremy Calhoun was injured while he was an employee of the gallery, and therefore, the exclusions

set forth in St. Paul's general liability policy prevent him from recovering for those injuries under that insurance policy.

The jurisprudence generally holds that a comprehensive general liability policy, such as St. Paul's, does not apply to a claim for personal injuries by an employee of the insured. For example, in Jones v. Thomas, 557 So.2d 1015 (La.App. 4th Cir. 1990), the fourth circuit referred to similar language and concluded that an injury sustained by an employee was not covered by the comprehensive general liability policy at issue. Moreover, the court found no merit to the plaintiff's contention that the exclusions were ambiguous. The court further commented on the purpose behind these types of policies as follows:

> The purpose of a comprehensive general liability policy is to provide coverage for injuries to third persons only -- this being the very reason for the exclusions. This conclusion is supported by the testimony of insurance expert, Robert Breeden. He testified that the type of injury sustained by Jones is covered by a Worker's Compensation/Employer's Liability policy and is never covered by a Comprehensive General liability policy

> which is the very reason for the exclusions in question.
>
> 557 So.2d at 1019.

The same result was reached in Fidelity & Guar. Ins. v. City of Kenner, 894 F.2d 782 (5th Cir. 1990). Here, the comprehensive general liability insurer brought a declaratory judgment action to determine whether it had the duty to defend a third party suit against its insured, the City of Kenner. The third party suit was filed against the City by present and former employees of the Kenner Police Department. Fidelity's policy provided basic comprehensive general liability coverage to the City. One of the exclusions of the policy provided that the insurance did not apply to bodily injury to any employee of the insured. The court held that the complaint unambiguously excluded coverage for the City because the policy did not apply to injuries sustained by employees of the insured arising out of their employment. Thus, Fidelity was under no obligation to defend the City in the suit.

Likewise, the policy issued by St. Paul to Jerry and Helen Haynes does not apply to any injury

sustained by one of their employees, Jeremy Calhoun. As established above, Jeremy Calhoun was an employee of his grandparents' business. In this capacity, Jeremy Calhoun suffered an injury. This injury, however, is specifically excluded from the liability coverage provided by St. Paul's insurance policy. The purpose of St. Paul's policy was to provide coverage for injuries to third persons. Jeremy Calhoun is not considered a third person under this policy. Instead, Jeremy Calhoun is an employee and cannot receive benefits based on the clear language of the policy.

The plaintiff argues that Jeremy Calhoun did not receive worker's compensation benefits for his injury and, therefore, the employee exclusion under the St. Paul policy does not apply. Whether or not Jeremy Calhoun received worker's compensation benefits or even has a claim for worker's compensation benefits against the business is irrelevant to the question of coverage.

This situation was addressed by the Louisiana Supreme Court in Spain v. Traveler's Ins. Co., 332

So.2d 827 (La. 1976). In Spain, a legal secretary was injured while riding as a passenger in an automobile which was owned and being driven by the attorney by whom she was employed. The plaintiff and her employer were returning from a work related conference. The question before the court was whether the policy issued by Traveler's excluded coverage for the plaintiff's injuries. The automobile liability policy stated that coverage did not apply to injuries to any employee of the insured:

> arising out of and in the course of (1) domestic employment by the insured, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the insured. . . .

The trial court considered the exclusion to only be applicable if the employee was not eligible for worker's compensation benefits. At the time of this case, worker's compensation benefits only extended to hazardous occupations. The trial court then concluded that because the plaintiff was not engaged in a hazardous occupation, she was not eligible for

worker's compensation benefits and, therefore, the exclusion was not applicable. The court of appeal reached the same result finding that the exclusion was ambiguous and, therefore, invalid. However, the Louisiana Supreme Court disagreed, stating:

> We cannot subscribe to the rationale employed by either court below. The exclusion is neither ambiguous as found by the court of appeal nor susceptible to the strained interpretation given it by the trial court. A reading of the exclusion, particularly in light of the numbering used to set off the clauses therein, leaves no doubt as to its meaning: All employees of an insured injured in the course and scope of their employment are excluded from coverage under the policy unless they are domestic employees who are not covered by workmen's compensation.
>
> 332 So.2d at 830.

Accordingly, the court held that the exclusion relieved the defendant of any liability to the plaintiff. More importantly, the Louisiana Supreme Court specifically rejected the very argument that the plaintiff in this case is asserting. According to the Louisiana Supreme Court, the eligibility of an employee for worker's

compensation benefits is irrelevant to the enforceability of an exclusion.

The plaintiff also argues that there is disagreement among the Louisiana appellate courts about the Louisiana Child Labor Law and that this law allows Jeremy Calhoun to sue his grandparents' liability carrier for negligence. Yet, the question of whether or not Jeremy Calhoun has a claim against his grandparents under these Louisiana statutes is irrelevant to the question of coverage under the comprehensive general liability policy issued by St. Paul. That policy, as stated above, excludes all claims by employees for personal injuries. The cases cited by the plaintiff in support of this proposition simply describe what possible causes of action a plaintiff might have under the statute if in fact the statute factually applied to them. These cases do not deal with the issue of insurance coverage and are, therefore, inapplicable.

III. ANY CLAIMS AGAINST TWT MOULDING COMPANY AND WALL MOULDING, INC. BY JEREMY CALHOUN HAVE PRESCRIBED,

BECAUSE THE PLAINTIFF DID NOT FILE SUIT WITHIN THE ONE-YEAR PRESCRIPTIVE PERIOD, THERE ARE NO OTHER POTENTIAL SOLIDARY OBLIGORS REMAINING IN THE LAWSUIT, AND THE 1992 AMENDMENT TO THE PRESCRIPTION STATUTE CANNOT APPLY RETROACTIVELY.

The plaintiff, Jeremy Calhoun, was injured on December 20, 1990. His representative had one year from the date of his injury, until December 20, 1991, to file suit against the defendants. Suit was instituted within this period against defendants, Dumas Brothers and St. Paul. After this prescriptive period had run, however, TWT and Wall were added as defendants. The original named defendants are no longer involved in this suit, having been dismissed by separate judgments. Thus, there are no defendants with whom TWT and Wall can be potentially solidarily liable. Because TWT and Wall were not named as defendants until more than one year from the date of the accident and there is no potentially solidary defendant remaining, Jeremy Calhoun's claim has prescribed.

A. Prescription was not interrupted as to TWT and Wall, since these defendants were not sued timely

and Dumas and St. Paul cannot be liable to the plaintiff.

At the time of Jeremy Calhoun's accident, La. Civ. Code art. 3492 provided the prescriptive period for delictual actions as follows:

> Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained.

Additionally, La. Civ. Code art. 3468 governs the issue of prescription as to minors as follows:

> Prescription runs against absent persons and incompetents, including minors and interdicts, unless exception is established by legislation.

Accordingly, the prescriptive period of one year for delictual actions established under La. Civ. Code article 3492 runs against the minor in this suit, Jeremy Calhoun, during the period of his minority. Because Jeremy Calhoun was injured on December 20, 1990, his representative had one year from the date of his injury to file suit in order to recover for his injury. Jeremy's representative did file suit within this period on July 22, 1991. Named as defendants in this complaint were St. Paul and Dumas Brothers. After

the prescriptive period had run, however, the plaintiff amended her complaint to "substitute" TWT and Wall as defendants in the place of Dumas Brothers. Thus, the plaintiff must present some basis upon which prescription was interrupted as to TWT and Wall in order to maintain the action against these defendants.

It is well settled that suit against one solidary obligor interrupts prescription as to other solidary obligors. La. Civ. Code arts. 1799 and 3503. Thus, the filing of suit against Dumas and St. Paul interrupted prescription as to TWT and Wall. However, both the Louisiana state courts and the United States federal courts have consistently held that while prescription is interrupted against solidary obligors, prescription is not interrupted as to an untimely sued defendant where the timely sued defendant was ultimately found not liable. See, e.g., Smith v. Xerox Corporation, 718 F.Supp. 494 (E.D. La. 1989); Younger v. Marshall Industries, Inc., 618 So.2d 866 (La. 1993) (where evidence did not establish that treating physician was solidary obligor with hospital for injuries sustained by plaintiff, then timely filing of

suit against treating physician would not interrupt prescription as to claim against hospital); Spott v. Otis Elevator Company, 601 So.2d 1355 (La. 1992).

Accordingly, Dumas Brothers and St. Paul have been dismissed and can no longer be held solidarily liable with TWT and Wall. Thus, prescription was not interrupted by the timely filing of suit against Dumas Brothers and St. Paul, and the action against TWT and Wall has prescribed.

B. The 1992 Amendment to La. Civ. Code art. 3492 cannot be retroactively applied to Jeremy Calhoun's suit for retroactive application would revive an already prescribed cause of action.

In 1992, after Jeremy Calhoun had reached the age of majority and after TWT and Wall had been sued and served, a third sentence was added to La. Civ. Code art. 3492 which presently reads as follows:

> Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products

> Liability Act or state law governing product liability actions in effect at the time of the injury or damage.

This amendment became effective on August 21, 1992. This amended version of La. Civ. Code art. 3492 is not applicable to this suit.

The general rule is that prescription statutes are remedial in nature and are generally accorded retroactive application. Lott v. Haley, 370 So.2d 521, 523 (La. 1979). There are two situations, however, where prescription statutes are not retroactively applied: (1) where retroactive application would strip a party of a vested right or (2) where retroactive application would revive an already prescribed cause of action. LeBlanc v. City of Lafayette, 558 So.2d 259, 262 (La.App. 3rd Cir. 1990). Both of these exceptions are applicable in the case at bar, and, therefore, the 1992 amendment to Louisiana Civil Code article 3492 cannot be retroactively applied.

First, retroactive application would revive Jeremy Calhoun's already prescribed cause of action. The Louisiana Supreme Court recently ruled that this amendment to La. Civil Code art. 3492 could not be

retroactively applied in Chance v. American Honda Motor Company, Inc., 635 So.2d 177 (La. 1994). Here, an eleven-year-old was injured on October 25, 1987 while riding a three-wheeled vehicle manufactured by Honda. A products liability action was filed for these injuries on December 17, 1992. Honda filed an exception of prescription. The trial court denied this exception relying upon the 1992 amendment to La. Civ. Code art. 3492. Honda applied for supervisory writs, and the court of appeal held that the 1992 amendment could not be applied retroactively to revive the plaintiff's already prescribed cause of action. 624 So.2d 23 (La.App. 3rd Cir. 1993). The Louisiana Supreme Court granted certiorari to review the appellate court's decision. The supreme court found no expression of legislative intent to revive prescribed claims and declined to apply the statute retroactively.

Likewise, the 1992 amendment to La. Civ. Code art. 3492 should not be applied retroactively in this case to revive Jeremy Calhoun's already prescribed cause of action. Instead, the previous

version of this article applies and provides a one year prescriptive period with no suspension during minority. Therefore, Jeremy Calhoun, through his proper representative, had one year from the date of his accident in which to bring suit against TWT and Wall. By failing to file suit against these defendants until more than one year after the accident, Jeremy Calhoun's claim has prescribed.

The plaintiff ignores the clear holding against retroactive application by the Louisiana Supreme Court in Chance. Instead, he contends that TWT and Wall did not have the right to plead prescription because prescription had already been interrupted against them. Because of his allegations of solidary liability with the other defendants in his suit against TWT and Wall, the plaintiff argues that, therefore, retroactive application of the 1992 amendment would not revive an already prescribed cause of action. There are several flaws in this reasoning.

The first flaw is in the overly broad way the plaintiff views the term "cause of action". The Louisiana Supreme Court has defined "cause of

action" as "an act by a defendant which gives a plaintiff a right to invoke judicial interference on his behalf." Trahan v. Liberty Mutual Insurance Company, 314 So.2d 350, 353 (La. 1975). The supreme court further stated that "a cause of action in tort has no identity independent from the defendant upon whose fault it is based." Id. The Louisiana Supreme Court's definition of "cause of action" is defendant specific. This defendant-specific view of "cause of action" was recently reaffirmed in Everything on Wheels v. Subaru South, 616 So.2d 1234, 1238 (La. 1993), where the court defined "cause of action" as the operative facts which give rise to the plaintiff's right to judicially assert the action against the defendant.

Accordingly, Jeremy Calhoun's cause of action must be defined in terms of specific defendants. In particular, the plaintiff's cause of action must be stated in connection with TWT and Wall. The question to be answered in this case, therefore, is whether retroactive application of the 1992 amendment would revive Jeremy Calhoun's already prescribed cause of action against TWT and Wall.

This question must be answered in the affirmative. Jeremy Calhoun was injured on December 20, 1990. His representative had one year from the date of his injury, until December 20, 1991, to file suit against the responsible parties. TWT and Wall were sued by the plaintiff on May 5, 1992. By this date, Jeremy Calhoun's cause of action against TWT and Wall had already prescribed. Retroactive application of the 1992 amendment would revive the plaintiff's cause of action against these defendants.

The second flaw in Jeremy Calhoun's reasoning is in his assertion that the timely filing of suit against Dumas Brothers and St. Paul interrupted prescription as to other potential solidary obligors. Here, solidary liability does not exist. The plaintiff mistakenly believes that mere allegations of solidary liability somehow prevent his cause of action against TWT and Wall from becoming "an already prescribed cause of action."

The plaintiff is correct in his assertion that suit against one solidary obligor interrupts prescription as to other solidary obligors. What the plaintiff ignores,

however, is the fact that prescription is not interrupted where a timely-sued defendant is ultimately found not to be liable or where solidary liability is ultimately found not to exist. See, e.g., Picone v. Lyons, 601 So.2d 1375 (La. 1992) (allegations that late-named defendants are solidarily liable for the plaintiff's injuries interrupted prescription only if defendants were ultimately found to be solidarily liable); Spott v. Otis Elevator Company, 601 So.2d 1355 (La. 1992) (plaintiff may not rely on solidary liability to interrupt prescription as to late-named defendant where timely-sued defendant was ultimately found not liable.); Provident Life & Accident Insurance v. Turner, 582 So.2d 250 (La.App. 1st Cir. 1991) (if solidary liability is alleged and not actually proven, then exception of prescription should be maintained as to late-named defendant at that time).

Likewise, Jeremy Calhoun's unproven allegations of solidary liability cannot serve as an interruption of prescription in his cause of action against TWT and Wall. While Jeremy Calhoun may have alleged solidary liability, this solidary liability has

clearly not been established due to the dismissal of the timely-sued defendants, Dumas Brothers and St. Paul. Thus, prescription was never interrupted as to TWT and Wall, and Jeremy Calhoun's cause of action against these defendants has prescribed.

The plaintiff also erroneously assumes that TWT and Wall obtained the right to plead prescription after the dismissal of Dumas Brothers and St. Paul, the timely-sued defendants, and after La. Civil Code art. 3492 had been amended. Instead, the right to plead prescription was obtained by TWT and Wall upon the expiration of the applicable one-year prescriptive period.

The point at which the right to plead prescription becomes fixed was explained by the Louisiana Supreme Court in Chance as follows:

> For while the defendant does not acquire anything during the running of the prescriptive period, once the time period has elapsed, the legislature grants the defendant the right to plead the exception of prescription in order to defeat the plaintiff's claim. Because the defendant acquires the right to plead the exception of prescription, a change in that right constitutes a substantive

> change in the law as applied to the defendant. Thus, were we to interpret the amendment at issue to allow the revival of prescribed causes of action, the substantive rights of the defendant would be materially changed because he would be stripped of this acquired defense.
>
> Chance, 635 So.2d at 178, (citations omitted, emphasis added.)

Therefore, the right of TWT and Wall to raise the defense of prescription became fixed on December 20, 1991, as soon as the one-year prescriptive period on tort claims had elapsed. After TWT and Wall acquired this right, La. Civil Code art. 3492 was amended. Retroactive application of this 1992 amendment would deprive TWT and Wall of this defense and would materially change their substantive rights.

C. Retroactive application of the 1992 Amendment would divest TWT and Wall of their vested right to plead prescription.

Retroactive application of the 1992 amendment to Louisiana Civil Code art. 3492 would also divest TWT and Wall of a vested right. The vested right in this case is the right of TWT and Wall to plead the

defense of accrued prescription. TWT and Wall acquired this right once the applicable one-year prescriptive period expired.

In the concurring opinion in Chance, Justice Hall discussed the vested right aspect of retroactivity as follows:

> Given our prior jurisprudence and the civilian teachings, I would squarely hold that the right to plead the peremptory exception of prescription is a vested right. It follows that the well-settled rule that amendments to procedural--prescription--statutes are not retroactively applied when to do so would divest vested rights applies here.

Chance, 635 So.2d at 180.

Several Louisiana decisions have also indicated that the right to plead prescription is a vested right. For example, in White v. West Carroll Hosp., Inc., 613 So.2d 150 (La. 1992) the second circuit stated:

> Extending or prolonging the period in which a suit may be brought to assert a right pertains to the remedy and does not violate a vested property right, unless the right has become perfected and fixed by the completion of the prescription at the

> time the extension of the period becomes effective.
>
> 598 So.2d at 1141, citing Splane v. Tubre, 6 So.2d 361, 363 (La.App. 1st Cir. 1984) (emphasis added).[1]

Likewise, the third circuit considered the right to the effect of prescription to become vested upon the completion of the prescriptive period in Lyman v. Town of Sunset, 567 So.2d 1171,1172 (La.App. 3rd Cir.), writ denied, 571 So.2d 648 (1990).

Although the Louisiana Supreme Court found it unnecessary to address the issue of whether or not the right to plead accrued prescription was a constitutionally vested right in White v. West Carroll Hosp., Inc., (cited in footnote number 1), that court states in Louisiana Health Service and Indem. Co. v. McNamara, 561 So.2d 712, 718 (La. 1990), that the right to assert prescription is a property right of which the defendant cannot be deprived:

> Unlike statutes of limitations at common law, which are merely procedural bars to the enforcement of obligations, civilian

---

[1] White v. West Carroll Hosp., Inc., was remanded to the Second Circuit by the Louisiana Supreme Court on other grounds at 613 So.2d 150 (La. 1992).

> prescriptive periods act to extinguish the civil obligation to which they applied. The patrimony of the obligor is increased when a claim prescribes, and his right to plead prescription in defense to a claim on the obligation is itself property that cannot be taken from him. (emphasis added)

In light of the Supreme Court's pronouncements in Louisiana Health Service and Indem. Co. v. McNamara, the retroactive application of an amended prescription statute in this case would deprive TWT and Wall of a property right. Implicit in the Louisiana Supreme Court's statement is that such a retroactive application is a denial of rights under the United States and Louisiana Constitutions.

Following these decisions, the right to plead the exception of prescription is a vested right possessed by TWT and Wall. These defendants acquired this right upon the completion of the one-year prescriptive period. The subsequent amendment to La. Civil Code Art. 3492 cannot be retroactively applied to divest TWT and Wall of this right.

CONCLUSION

A. DISMISSAL OF ST. PAUL.

There is no material issue of fact respecting Jeremy's employment status at the time of his injury. The District Court was correct in its conclusion when it said:

> . . . there is no question as to the fact that Jeremy worked at the Gallery, was given Gallery-related duties to perform, and was paid regularly based solely on the amount of hours he spent at the Gallery, less any advances. He was an employee of the Gallery. p.290

It follows, therefore, that Jeremy falls within the exclusion in the St. Paul CGL policy, and the decision of the Fifth Circuit Court of Appeals affirming the trial court's dismissal of St. Paul should not be disturbed.

B. DISMISSAL OF TWT AND WALL.

Following the Louisiana Supreme Court cases, plaintiff's claim against TWT and Wall has prescribed, and was therefore properly dismissed by the trial court. The 1992 amendment to the Louisiana prescription statute cannot be applied retroactively to TWT and Wall where the accident which forms the

basis of the lawsuit occurred in 1990. Therefore, the affirmation of that dismissal by Fifth Circuit Court of Appeals should not be disturbed by this Court.

C. SUMMARY

For the above reasons, the plaintiff's application for writ of certiorari should be denied by this Court.

Respectfully Submitted,

PERCY, SMITH & FOOTE

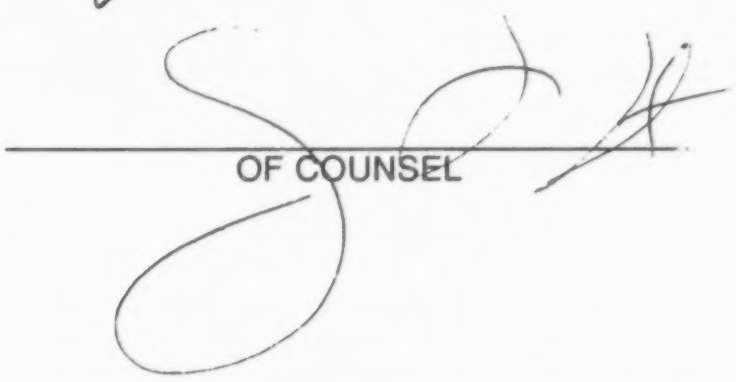
BY: _____
ELIZABETH ERNY FOOTE
LSBA #5677
720 Murray Street
P.O. Box 1632
Alexandria, LA 71309-1632
Tele: (318) 445-4480
Attorneys for TWT Moulding, Company and Wall Moulding, Inc., Defendant-Appellees

HAYES, HARKEY, SMITH & CASCIO

BY: _____
HAYNES L. HARKEY, JR.
LSBA #6561
2811 Kilpatrick Blvd.
Monroe, LA 71301
Tele: (318) 387-2422
Attorneys for St. Paul Fire & Marine Insurance Company Defendant-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the above and foregoing Opposition to Petition for Writ of Certiorari upon Mr. Donald G. Cave, Cave & McKay, 7465 Exchange Place, Baton Rouge, Louisiana, by placing same in the United States mail, postage prepaid and properly addressed on this the 3rd day of May, 1995.



OF COUNSEL